Petition

81-714

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHYLLIS M. ANDERSON,
Petitioner,

vs.

THE LOW RENT HOUSING COMMISSION OF MUSCATINE, IOWA and GEORGE SIX,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE IOWA SUPREME COURT ERRED IN HOLDING THAT THE NEW YORK TIMES RULE APPLIES TO A NON-MEDIA DEFENDANT.

II. WHETHER THE IOWA SUPREME COURT ERRED IN HOLDING THAT PLAINTIFF WAS A "PUBLIC FIGURE".

LIST OF PARTIES

1. Phyllis M. Anderson, Plaintiff
2. Low Rent Housing Commission of Muscatine, Iowa, Defendant
3. George Six, Defendant
4. Jeffrey Schott, Defendant
5. City of Muscatine, Iowa, Defendant

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JURISDICTIONAL STATEMENT

The Supreme Court of the State of Iowa filed its opinion on April 15, 1981, reversing the trial court's overruling of the Motion for a New Trial or Judgment N.O.V. filed by Defendants Low Rent Housing Commission and George Six. The trial court's ruling and the judgment on the jury verdict were filed June 28, 1979. Petitioner believes the Court has jurisdiction to review this decree under 28 U.S.C. §1257(3).

CONSTITUTIONAL STATEMENT

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. First Amendment, United States Constitution.

STATEMENT OF THE CASE

Phyllis M. Anderson was employed as a secretary by the City of Muscatine in its Community Development Department. Controversy arose concerning the relationship of that Department and the Low Rent Housing Commission (LRHC), a City agency comprised of volunteers who served on the Commission and an employee, Bob Campagna, who worked in the Community Development Department. The controversy revolved around whether he worked for that Department. The Department was also involved in allegations unrelated to the LRHC concerning the misuse of urban renewal funds, which allegations led to an F.B.I. investigation, an audit by the Iowa State Auditor and the eventual refunding by the City to the federal government of misapplied funds. No criminal indictments or informations were ever brought.

On or about October 20, 1975, George Six, an LRHC member, drafted a statement detailing the complaints of the LRHC against the Community Development Depart-

ment. He wrote, "She (Anderson) also has become a serious source of difficulty for the LHA (another name for the LRHC)." He then showed the statement to Rod Neaville, a local radio news reporter. The evidence showed that Mr. Neaville did not receive a copy of the statement, and that he never used it in any of his news reports. The LRHC members all signed the statement, showed it to Bob Campagna and his attorney, Mike Liebbe, and gave it to the City Council, Mrs. Anderson's employer. The jury determined the statement was libelous and awarded damages to Mrs. Anderson for $15,000.00 against the LRHC and $20,000.00 against George Six. The trial court held that the damage amounts were justified by the evidence, and no appeal of this point was pursued.

In February, 1976, Mrs. Anderson was fired. Up to the time of her firing she had made some contacts with the press asking that reporters look in the City files to get the true story and making other statements about some controversial matters. The trial court held that on

October 20, 1975, Mrs. Anderson was a "public figure" due to these contacts. The nature of the contacts and the number of such contacts is a contested issue. It is uncontested that prior to October 20, 1975, no reporters either directly or indirectly reported any statements Mrs. Anderson is alleged to have made, or in any other way stated her views on controversial matters.

The trial court instructed the jury as follows with respect to the libel claim against the LRHC and George Six:

> To entitle the plaintiff to recover under the first two divisions of her petition, the burden of proof is upon her to establish with respect to each defendant by a preponderance of the evidence each and all of the following propositions:
> 1. That the defendant made a statement of and concerning the plaintiff.
> 2. That such statement defamed the plaintiff.
> 3. That the statement was false in some material particular.
> 4. That the statement was communicated to some person other than the plaintiff.
> 5. That the statement was published by the defendant either:

a. With knowledge that the statement was false, or;
b. With reckless disregard as to whether the statement was true or false.

If the plaintiff has established all of the above propositions by a preponderance of the evidence as to either Division I or II, then the plaintiff is entitled to recover damages on each such division you so find. If the plaintiff has failed in either Division I or Division II to establish by a preponderance of the evidence any one of the propositions, then plaintiff cannot recover and your verdict will be for the defendant on each such division.

Plaintiff objected on the grounds that this standard did not apply to a non-media defendant, and that she was not a "public figure" on October 20, 1975. (Tr. at 1523, 1537) Defendants objected on the ground that malice had to be proved by clear and convincing evidence. (Tr. at 1537-38) The trial court specifically predicated its applying the "preponderance of the evidence" standard on the fact Defendants were not part of the media. (Tr. at 1533-36) The Iowa Supreme Court stated that, if Mrs. Anderson were correct, the

judgment below should be affirmed, but that she was a public figure and that malice had to be proved by clear and convincing evidence even when there was a non-media defendant. Anderson v. Low Rent Housing Commission, 304 N.W.2d 239, 245-47 (Iowa 1981).

ARGUMENT

Petitioner believes her Petition should be granted for the following reasons:

(a) The Iowa Supreme Court decision conflicts with the decisions of other courts.

(b) The Petition involves an important question of federal law which has not been, but should be, resolved by this court.

The Iowa Supreme Court decided that the full force of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) applies to non-media defendants. As shown by Petitioner's Statement of the Case, this issue is squarely presented by the deci-

sions below, and its resolution by this Court will determine whether Mrs. Anderson's libel judgment will be affirmed or whether she will have to face another trial of her claim. The Iowa Supreme Court's decision directly conflicts on this issue with decisions of the Louisiana Court of Appeals and the District Court of the District of Columbia.

Norris v. King, 355 S.2d 21 (La. Ct. App.), cert. denied, 439 U.S. 995 (1978), reh. denied, 439 U.S. 1122 (1979), involved the posting of pictures on a bulletin board in a laundromat. Norris had allegedly been photographed stealing from King's laundromat. In an effort to coerce restitution, King displayed the photographs. Norris sued based on an invasion of privacy theory and recovered, and King appealed, alleging the New York Times standards should apply. The Court of Appeals affirmed the judgment, stating that the defendant would be correct if he were a member of the news media. However, publications by one individual involving another were not subject to the same con-

cerns as publications by the news media with their responsibilities

> to bring forth information to the public, to apprise the public of the events transpiring from day to day. That responsibility, duty and purpose are not shared by the ordinary individual.

Id. at 24-25.

In Logan v. District of Columbia, 447 F. Supp. 1328 (D.C.D.C. 1978), plaintiff Logan brought suit against the Washington Post, Leon Dash, a reporter, the District of Columbia, Dr. Fred West, the administrator of the District's Narcotics Treatment Administration, and Albert Russo, West's superior. He claimed that he was defamed and his privacy was invaded by a statement Dr. West made to Dash about Logan's participation in a drug treatment program, which statement was published in the Post. The District Court dismissed the claims against Dash and the Post on First Amendment grounds, but held that Logan did not have to show actual malice against the other defendants as they were not members of the media. Id. at 1335-36.

Both of the above-described decisions conflict with that of the Iowa Supreme Court. The case of Hutchinson v. Proxmire, 443 U.S. 111 (1979) indicates why this Petition "involves an important question of federal law which has not been, but should be, settled by this Court." Rule 17, Supreme Court Rules. In that case the Court held that Hutchinson was not a public figure at the time of the alleged libel against him. However, in footnote 16 the Court stated:

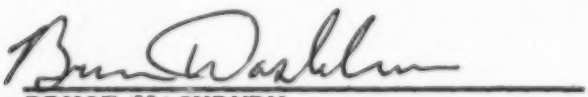
> Neither the District Court nor the Court of Appeals considered whether the New York Times standard can apply to an individual defendant rather than to a media defendant. At oral argument, counsel for Hutchinson stated that he had not conceded that the New York Times standard applied. . . This Court has never decided the question; our conclusion that Hutchinson is not a public figure makes it unnecessary to do so in this case.

Id. at 133.

Petitioner is sure the Court is aware that many law suits involving the important area of First Amendment rights have

been decided on the New York Times standard, and that many more will be so decided. Litigants both rich and poor, powerful and powerless, need to know the scope of that standard, and only this Court can articulate it. For these reasons Petitioner urges that her Petition be granted as one involving an important question of federal law which has not been, but should be, decided by this Court.

Respectfully submitted,



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APPENDIX

Trial transcript at pp. 1533-36:

The Court: Well, in any event, having heard the objection to Instruction Number two and Instructions four, ten and eleven, the Court has reviewed the law in connection with those matters and it's the Court's view now that Instruction 10.1, which is the requested stock instruction on libel provides that libel is the malicious damaging of a person and so forth, and that the use of the word "malicious" invokes the current definition of what is malicious, which is that a statement is made with knowledge that it is false or with reckless disregard as to whether or not the statement was true or false, as opposed to the common law definition which involved ill will or hatred, which may or may not be different. So, in light of those conclusions, the Court feels that the use of the word "malicious" is correct. However, there is some differences here, in light of the fact that the Defendants are not media defense (sic), but are

private persons, there seems to be at least the authority of the Law Review Article in 63 Iowa Law Review 1067, makes no differentiation between the Defendants and states that the key is the identity of the Plaintiff as to whether the Plaintiff is a public official or a voluntary or involuntary public figure. The Court believes that if there is a difference, it can only lay in the quantum of proof required and not in the definition. It seems to this Court that an individual's right of free speech is just as constitutionally precious as the media's right to free press and that it would be constitutionally impermissible to differentiate between the news media and other individuals on that basis. Further, that if there would be a differentiation made, that it should place the greater burden upon the news media which in most instances has the greater ability to defend itself than a private individual would have, both in resources and in public acceptance of its views.

So, in balancing all of these problems,

it is the conclusion of this Court that instead of changing the definition of malice to a common - - libel - - to a common law definition, that the requirement of proof should be changed from that established in those cases following Times versus Sullivan, so that in the case of the non-media defendant, the public official or public figure plaintiff need only prove the elements by a preponderance of the evidence, as is the standard in ordinary civil cases, rather than requiring that the malice, that is, the knowledge of the falsity or the reckless disregard as to whether or not the statement was false, be required to be proved by a standard of clear and convincing evidence.

Phyllis M. ANDERSON, Appellant,
Cross-Appellee,

v.

The LOW RENT HOUSING COMMISSION OF MUSCATINE, Iowa; George Six; and Jeffrey Schott, Acting Community Development Director, Cross-Appellants,

Appeal of the CITY OF MUSCATINE, Iowa.

Nos. 63597, 63834.

Supreme Court of Iowa

April 15, 1981.

Bruce Washburn, Iowa City for appellant, cross-appellee.

John D. Stonebraker of McDonald, Stonebraker & Cepican, Davenport, and Patrick M. Ryan of Eckhardt, Goedken, Hintermeister & Ryan, Muscatine, for appellee and cross-appellants.

Considered by LeGRAND, P.J., and UHLENHOPP, McGIVERIN, LARSON, and SCHULTZ, JJ.

SCHULTZ, Justice.

This consolidated appeal grew out of a suit in five divisions based on libel, invasion of privacy, and wrongful discharge from employment. The plaintiff, Phyllis M. Anderson (Anderson), was formerly employed as a secretary in the Community Development Department of defendant

City of Muscatine, Iowa (City); her immediate supervisor was defendant Jeffrey Schott (Schott), the city's acting Community Development Director. Defendant Low Rent Housing Commission of Muscatine, Iowa (LHA), was established by ordinance under the provisions of chapter 403A, The Code 1970, and is governed by five commissioners, one of whom is defendant George Six (Six).

During the course of her employment from January 1975 until she was dismissed on February 17, 1976, fifty-four weeks later, Anderson was in the midst of a controversy, which received widespread coverage from the news media, involving city projects, officials, and fellow employees. This multi-party action stems from that controversy. In the trial below Anderson contended that she was wrongfully discharged. She claimed she had a constitutionally protected liberty interest in her employment, and that the circumstances underlying the termination of that employment deprived her of due process of law in violation of the fourteenth amendment to

the United States Constitution. She also maintained that she was the victim of a libel by Six and LHA on October 20, 1975, and that the City and Schott invaded her privacy on February 17, 1976, by disclosing the facts surrounding her termination to the media.

The wrongful termination claim, which was tried to the court, was dismissed. Anderson appeals from that ruling. We affirm. LHA and Six appeal from a judgment entered in part on jury verdicts rendered in favor of Anderson on the libel claim. We reverse and remand. Schott appeals from the portion of the judgment entered on jury verdicts awarding Anderson actual and punitive damages on the invasion of privacy claim. We affirm. Schott also claims the trial court erred in allowing the admission of an exhibit introduced for the limited purpose of showing that Anderson typed the exhibit at the mayor's request. We find no error in that ruling.

I. Jurisdiction of Anderson's appeal. Since there was some question as to wheth-

er or not Anderson's appeal was taken from a nonfinal judgment, we required the parties to brief the issue.

Anderson appeals from the trial court's dismissal of her wrongful termination claim, which was tried to the court while her other claims were simultaneously tried to a jury. At the time the trial court issued its ruling on the wrongful termination claim, the jury had returned verdicts on the other claims, and post-trial motions were pending on those claims. The nonfinality issue arose because Anderson appealed from the adverse ruling on the wrongful termination claim prior to the time the trial court ruled on the post-trial motions.

Anderson claims that the ruling on the wrongful termination claim was a final judgment within the meaning of Iowa R.App. P. 5. We need not decide the accuracy of this assertion, however, because we conclude that Iowa R.App.P. 1(c), which became effective July 1, 1980, is dispositive of this jurisdictional issue. Appellate rule 1(c) provides:

> If an appeal to the supreme court is improvidently taken because the order from which appeal is taken is interlocutory, this alone shall not be ground for dismissal. The papers upon which the appeal was taken shall be regarded and acted upon as an application for interlocutory appeal under rule 2, rules of appellate procedure, as if duly presented to the supreme court at the time the appeal was taken.

In Smith v. Partnership of Korf, Diehl, Clayton and Cleverley, 302 N.W.2d 137, 138 (Iowa 1981), we held that appellate rule 1(c) is to be given retrospective effect and thus applies to all appeals pending on its effective date, as well as those perfected thereafter.

It should be noted, however, that the rule permits us to grant appeal only as if application had been made under appellate rule 2. Appellate rule 2 allows us to entertain an appeal on an interlocutory ruling upon finding that the ruling "involves substantial rights and will materially affect and final decision and that a determination of its correctness before trial on the merits will better serve the interests of justice." We determine that

the present case meets the requirements of appellate rule 2. We therefore focus our attention on the merits of this appeal.

II. Liberty interest. Anderson's petition, as amended, alleged that the City and Schott wrongfully terminated her employment, depriving her of due process of law. Before the issues were submitted to the jury, the trial court sustained Anderson's motion to withdraw the wrongful termination claim from the jury and have the court determine the issue. The trial court subsequently dismissed the claim, ruling that Anderson did not have a constitutionally protected liberty interest, and that even if she did she was afforded due process. Anderson contends the trial court erred in so ruling. We must first determine whether Anderson had a constitutionally protected liberty interest which was affected by her discharge.

"Liberty interest" is a general, somewhat nebulous, term whose definition depends on the context in which it is used. The concept has its origin in the due pro-

cess clause of the fourteenth amendment to the United States Constitution: "(N)or shall any State deprive any person of life, liberty, or property, without due process of law . . ." As applied to public employment, due process does not afford a right to public employment, but it does afford certain constitutional rights in relation to such employment. See McDowell v. Texas, 465 F.2d 1342, 1345-46 (5th Cir. 1971), cert. denied, 410 U.S. 943, 93 S.Ct. 1371, 35 L.Ed.2d 610 (1973). Among these rights is the right to procedural due process when charges are brought against an employee which might seriously damage standing and association in the community or impose a stigma or other disability that forecloses the freedom of the employee to take advantage of other employment opportunities. Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548, 558-59 (1972).

It is necessary for us to examine the facts presented to the trial court in order to determine whether a constitution-

ally protected liberty interest was violated by Anderson's termination. When a violation of constitutional rights is alleged we review the facts de novo to make an evaluation of the totality of the circumstances under which the trial court's ruling on those constitutional rights was made. State v. Cullison, 227 N.W.2d 121, 126 (Iowa 1975).

It was agreed below that Anderson was an employee at will and had no statutory or contractual rights to due process. She was terminated summarily by Schott, her immediate supervisor, and was given a letter containing five reasons for her discharge, to-wit:

1. You have antagonized personnel in the Community Development Department and are a constant source of friction within the Department.

2. You have antagonized personnel in other departments in City Hall, creating animosities between City employees.

3. You have exceeded your position as Urban Renewal Secretary by directly intervening in matters beyond your authority.

4. I have received repeated criticisms from other City employees, Department Heads, City Council members, and members of City Commissions regarding your behavior.

5. You have lost my confidence, respect, and trust in your ability to function as Urban Renewal Secretary. As such, the working relationship essential to the efficient operation of the Department is gone. There is no way this situation can continue.

Several of these reasons were published by the news media. Whether Anderson, Schott, or someone else released the text of the letter is unclear from the controverted evidence in the record. Schott did discuss Anderson's termination with representatives of the news media, however, stating that there were five reasons for Anderson's dismissal, that it was precipitated by no one thing but by an accumulation of activities he could no longer tolerate, and that it was the action he felt could best remedy the difficulty caused by friction between employees in the department.

Anderson claims that under Roth a dis-

charged governmental employee who receives adverse publicity imposing a stigma that forecloses other employment opportunities should have an opportunity to refute the charges giving rise to the stigma. While we agree with this position, the nature of the charges here do not meet Roth's definition of stigma.

In Roth a first-year university professor, who was under a one-year contract, was not rehired. Roth sued alleging that the university's reason for not renewing his contract was to punish him for making statements criticizing the university administration. The United States Supreme Court rejected Roth's claim that the university's failure to provide him with a statement of reasons for nonretention and an opportunity for a hearing violated a constitutionally protected liberty interest. In so doing the Court said that the state did not charge Roth with anything that might seriously damage his standing or associations in the community in that he was not charged with dishonesty or immorality, and there was no suggestion that

his good name, reputation, honor, or integrity was at stake. Board of Regents v. Roth, 408 U.S. at 573, 92 S.Ct. at 2707, 33 L.Ed.2d at 558-59.

Other courts have held that accusations of incompetence, insubordination, hostility to authority, and unprofessional or unethical conduct do not violate a constitutionally protected liberty interest. See, e. g., Norbeck v. Davenport Community School District, 545 F.2d 63, 69 (8th Cir. 1976), cert. denied, 431 U.S. 917, 697 S. Ct. 2179, 53 L.Ed.2d 227 (1977)(employee charged with poor judgment and conduct failing to meet professional standards); Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 366, (9th Cir. 1976) (pathology resident charged with incompetence and inability to get along with co-workers); Gray v. Union County Intermediate Education District, 520 F2d. 803, 806 (9th Cir. 1975) (teacher terminated for student and parent problems undermining community social agencies, insubordination, incompetence, hostility toward authority, and agressive behavior); Brouillette v. Board

of Directors of Merged Area IX, 519 F.2d. 126, 127-28 (8th Cir. 1975)(teacher charged with tardiness and inability to maintain order); State ex rel. Trimble v. State Board of Cosmetology, 50 Ohio St.2d 283, 286-87, 364 N.E.2d 247, 250 (1977) (charge of unprofessional, unethical, and insubordinate conduct on single occasion).

While the liberty interest protected by the fourteenth amendment is the right to be free to move about and live and practice one's profession "without the burden of an unjustified label of infamy." Stretten v. Wadsworth Veterans Hospital, 537 F.2d at 366, "[p]ersonality differences or difficulty in getting along with others are simply not the kinds of accusations which warrant a hearing, as contemplated by Roth." Gray v. Union County Intermediate Education District, 520 F.2d at 806. To violate the constitutionally protected liberty interest the accusations must be of grave consequences. They must involve allegations of dishonesty, immoral, or illegal conduct that call into question the terminated employee's honesty,

reputation, or good name. Connealy v. Walsh, 412 F.Supp. 146, 159 (W.D.Mo. 1976). Basically, Anderson was accused of inability to get along with others, insubordination, and generally being a trouble maker. There was no imputation of dishonesty, immorality, or illegality implicating Anderson's honesty, reputation, or good name.

We hold that the trial court was correct in dismissing Anderson's wrongful termination claim. Anderson's termination, together with its accompanying publicity, did not violate a liberty interest protected by the fourteenth amendment. Accordingly, she was not entitled to a due process hearing.

Our holding renders it unnecessary for us to entertain Anderson's contention that she was not accorded due process at the hearing she received.

III. Libel. Anderson maintains that on or about October 20, 1975, approximately four months prior to her discharge, she was libeled by a written statement released by Six to Rod Neaville, a newsman, and

by LHA releasing the same statement to Robert Campagna and his attorney. The offending statement submitted to the jury by the court was: "She [Anderson] also has become a serious source of difficulty for the LHA." The jury determined that the statement was libelous and awarded damages in favor of Anderson against LHA in the amount of $15,000 and against Six in the amount of $20,000.

The trial court adopted part but not all of the standards prescribed by the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). In New York Times the Court held that the provisions of the first amendment apply to the states through the due process clause of the fourth amendment, and, consequently, state laws must require clear and convincing evidence of actual malice when a public official or public figure sues a media defendant for libel. Id. at 276-77, 283-86, 84 S.Ct. at 724, 727-29, 11 L.Ed.2d at 704, 708-10.

The trial court found Anderson to be a

public figure. It therefore instructed the jury that Anderson was required to prove that the allegedly libelous statement was published by Six and LHA with knowledge that the statement was false or with reckless disregard as to whether or not the statement was true or false. Because Six and LHA were nonmedia defendants, however, the trial court instructed the jury that such malice only had to be proved by a preponderance of the evidence.

Six preserved error by objecting that the quantum of proof required by New York Times is clear and convincing evidence. Anderson maintains that the trial court erred in finding her to be a public figure and, consequently, in requiring her to prove malice under the New York Times standard. If Anderson's contention that she was not a public figure is correct, the instruction requiring Anderson to prove libel by a preponderance of the evidence is correct, and the fact that she was incorrectly required to prove malice, an element of proof not required in an action brought by a private individual,

is immaterial.

To determine whether there was sufficient evidence to sustain the trial court's finding that Anderson was a public figure, it is necessary to define that term. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court stated that there are two types of public figures. First, there are individuals who through fame and notoriety are public figures for all purposes. Secondly, and more commonly, there are individuals who inject themselves or are drawn into a particular public controversy and thereby become public figures for a limited range of issues. "[S]uch persons assume special prominence in the resolution of public questions." Id. at 351, 94 S.Ct. at 3013, 41 L.Ed.2d at 812. "In either event, they invite attention and comment." Id. at 345, 94 S.Ct. at 3009, 41 L.Ed.2d at 808. The Gertz Court reasoned that public figures are not entitled to the same protection of their reputations as private parties because public figures have access to channels of effective com-

munication, have a reasonable opportunity to counteract false statements, and are not as vulnerable to injury as private individuals.

In determining that Anderson was a public figure the trial court stated:

"The Court has, as I have advised you, although I am not sure it has been made a record in this case prior to this time, concluded that the Plaintiff is a public figure. That conclusion is made upon the record as a whole, which discloses to the Court that Mrs. Anderson voluntarily injected herself into the issues then swerling (sic) in City government in the City of Muscatine. More particularly, the investigations that were going on in the Low Rent Housing and Urban Development departments. That she contacted candidates for public office, including Council and Mayor, and gave them counsel and advice and passed along information involving not only those issues, but apparently other issues as well. That she, in her pleading, identifies herself the major contact for the investigators and auditors

who were examining the Urban Renewal Program, and specifically the relocation records. That the issue involved was a matter of public interest as opposed to privately newsworthy, as was the case in the Firestone versus Time matter, where the alleged defamation grew out of the grounds for divorce between a prominent man and wife. But because the plaintiff here is, for the purposes of this trial, a public individual, it is the Court's view of the law that even though the Defendant is a non-media defendant as was raised by Plaintiff, nevertheless, the standard in the case of libel involves malice." Anderson does not challenge the propriety of the trial court's making the "public figure" determination. However, she maintains that the trial court erred in ruling that she was a public figure on October 20, 1975, the date the alleged libelous statement was released by Six and LHA. Even though this is a law action, our standard of review is de novo to ascertain whether the evidence supports the trial court's "public figure" finding, which is

a question of "constitutional fact." See New York Times Co. v. Sullivan, 376 U.S. at 284-85, 84 S.Ct. at 728-29, 11 L.Ed.2d at 709.

There is ample evidence in the record to substantiate the trial court's finding that Anderson had thrust herself into the issues then swirling in city government. She invited attention and influenced that controversy. Anderson herself admitted she had called a reporter concerning an FBI and HUD investigation three or four times during a period commencing in October.

Other events occurred prior to October 20 that are of a similar nature. News stories attached to her pleadings indicate that Anderson was a major contact for investigators and auditors examining Urban Renewal and relocation records. She was quoted as saying that her problems started the summer before she was discharged when she endeavored to correct problems and reported people who she felt were not doing their jobs properly. She told fellow employees that she had called the FBI and

complained about certain individuals. One co-worker described how she "unloaded" on an unknown man who visited city hall, telling him that nobody in municipal government was honest.

Newsman Knaapen stated she complained to him about Rod Parsons, her supervisor until he was terminated in November 1975, and reported to him concerning investigators and allegations. Newsman Neaville said Anderson told him things were amiss and made accusations, invited him to look into files, and called him at home about the FBI investigating city hall. Neaville testified that on October 19 he knew she was a trouble maker and an incredible news source. He also stated Anderson used the media "to get her points across." Newsman Martin testified that Anderson told him things were wrong in city hall, the city was being investigated by HUD and the FBI, and Parsons was having problems with the city administrator. Evelyn Schauland, who was then a candidate for mayor, testified that she received anonymous phone calls in August 1975 about

"crooks" and "dishonest people" and the FBI being called in. Upon receiving subsequent phone calls Schauland demanded to know who her caller was and learned that it was Anderson. Parsons, in a conversation with Six, described Anderson as being a member of the "gestapo." He also stated that Anderson could not keep her mouth shut, and, because of her, city business was all over town. From the foregoing we conclude that Anderson injected herself into issues of public interest involving the city and became a public figure for the purpose of the controversy surrounding those issues.

The trial court, although it adopted the New York Times standard of malice, refused to apply its clear and convincing evidence standard of proof. The court reasoned that the clear and convincing evidence standard was necessary in New York Times to promote and protect media discussion, but since the defendants in the present case were not members of the media they were not entitled to the same protection under the first amendment.

Anderson defends this ruling by arguing that freedom of speech and freedom of the press are not synonymous, and that the issue of whether the New York Times standard applies to nonmedia defendants is still an open question.

Subsequent to the trial in this case, however, we decided Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836 (Iowa 1980). In Blessum a county engineer sued the board of supervisors for defamation. We applied the New York Times actual malice standard, stating: "Clear and convincing proof of knowledge of falsity or reckless disregard for the truth must be shown." Id. at 843. Other state courts have also applied the New York Times standard without differentiating between media and nonmedia defendants. See Grad v. Copeland, 280 So.2d 461, 462 (Fla. Dist. Ct. App.), cert. denied, 287 So.2d 682 (Fla. 1973); Gibson v. Maloney, 263 So.2d 632, 636 (Fla. Dist. Ct. App.), cert denied, 268 So.2d 909 (Fla. 1972), cert. denied, 410 U.S. 984, 93 S.Ct. 1505, 36 L.Ed.2d 180 (1973); Hirman v. Rogers,

257 N.W.2d 563, 566 (Minn. 1977); Wollman v. Graff, 287 N.W.2d 104, 107 (S.D. 1980). And we find no basis in the plain language of the first amendment that would justify according greater protection to the media than to private parties, such as Six and LHA.[1]

We therefore hold that the New York Times standard requiring malice to be established by clear and convincing evidence applies to both media and nonmedia defendants in an action for libel. Since the trial court erred in failing to so instruct the jury, we reverse and remand for a new trial on the libel claim.

IV. Invasion of privacy. Late in the afternoon on February 17, 1976, Schott gave Anderson written notice of the termination of her employment. (This notice is set out in part in division II of this opinion.) Schott had a meeting with a

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1. U.S. Const. Amend. I provides in pertinent part: "Congress shall make no law ...abridging the freedom of speech, or of the press."

citizens advisory group that evening. After the meeting two media reporters confronted Schott and asked him to confirm Anderson's termination. Schott told them that he had given Anderson a letter of termination containing five reasons for her discharge. The next morning a local radio station aired a news story on Anderson's termination stating that although Schott would not make public the specific reasons for her dismissal it was precipitated by no one thing but by an accumulation of activities he could no longer tolerate. Schott was quoted to the effect that he had been plagued with two problems: one involved various investigations, and the other concerned friction between employees in the community development department. Schott was also quoted as saying that the dismissal of Anderson was the action he felt could best remedy that difficulty. Schott admitted that the news story was an accurate account of what he had told the reporter. The other reporter stated that Schott said: "The purpose of the dismissal was

to get the community development department back to working efficiently and effectively."

Anderson testified that she did not release information to the news media until after she heard the radio broadcast concerning her dismissal. She then admittedly went to local radio stations and the newspaper and provided them with rebuttal information. Some of the material contained in Anderson's termination notice was subsequently publicized by the news media, but it is unclear who disclosed this information to them.

The statement of issues submitted to the jury by the trial court limited Anderson's invasion of privacy claim to the allegation that on February 17, 1976, the date of her discharge, defendant Schott communicated untruthful information about her termination to the news media. The court instructed the jury that Anderson had the burden of proving that Schott made a statement or statements concerning Anderson, that one or more of such statements were false in some material respect,

that Schott gave publicity to such statement or statements, that such statement or statements placed Anderson in a false light which would be highly offensive to a reasonable person, and that Schott performed such acts with knowledge of the falsity of the statement or statements or with reckless disregard as to their falsity and the false light in which Anderson would be placed. The jury was also instructed that truth was a defense. The jury returned verdicts for actual damages of $10,000 and punitive damages of $10,000 against Schott in favor of Anderson.

Schott claims the trial court erred in refusing to instruct the jury on two affirmative defenses: waiver of the right of privacy and consent to public disclosure. Schott has not challenged the sufficiency of the evidence to support the jury's verdict, the trial court's instruction on quantum of proof, or the content of instructions on the definition and elements of invasion of privacy.

We will limit our review to those issues presented and argued by the parties.

See Zeman v. Canton State Bank, 211 N.W. 2d 346, 350 (Iowa 1973). It will be necessary, however, to review briefly the tort of invasion of privacy to determine whether instructions on the affirmative defenses of waiver and consent should have been submitted to the jury.

We have long recognized the common-law tort of invasion of privacy, and we have adopted the principles of Restatement (Second) of Torts § 652A (1977). See Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289, 291 (Iowa 1979), cert. denied, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980); Winegard v. Larsen, 260 N.W.2d 816, 822 (Iowa 1977); Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 821-22, 76 N.W.2d 762, 764-65 (1956). An invasion of privacy action may be based on any of four distinct wrongs: "(a) unreasonable intrusion upon the seclusion of another, . . . or (b) appropriation of the other's name or likeness, . . . or (c) unreasonable publicity given to the other's private life, . . . or (d) publicity that unreasonably places

the other in a false light before the public . . ." Restatement (Second) of Torts § 652A (1977). Anderson's claim was presented to the jury on the "false light" theory of invasion of privacy. See id. § 652A(d).

The "false light" variety of invasion of privacy is predicated upon an untruthful publication which places a person before the public in a manner that would be highly offensive to a reasonable person. Id. §652E. The essential element of untruthfulness differentiates "false light" from the other forms of invasion of privacy and many times affords an alternate remedy for defamation even though it is not necessary for a plaintiff to prove that he or she was defamed. Id. comments a-b.

The trial court placed the burden on Anderson to prove malice by showing that Schott either knew the allegedly offensive published statements were false or made the statements with reckless disregard as to the falsity of the matters asserted and the false light in which Anderson would

be placed. This is consistent with the line of defamation cases commencing with New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964), wherein a majority of the United States Supreme Court held that a public official had to prove actual malice in a defamation action. In 1967, in Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-65, 170, 172-74, 87 S.Ct. 1975, 1995-97, 1999, 2000-01, 18 L.Ed.2d 1094, 1115-17, 1120, 1121-22 (1967) (plurality opinion), the requirement of proof of malice was extended to defamation actions by public figures. The same year the actual malice requirement was also extended to invasion of privacy suits based on a "false light" claim in Time, Inc. v. Hill, 385 U.S. 374, 387-91, 87 S.Ct. 534, 542-44, 17 L.Ed.2d 456, 466-69 (1967). The Hill Court stated that the first amendment protects publications involving matters of "public interest." Id. at 387-91, 87 S.Ct. at 542-44, 17 L.Ed.2d at 466-69.

Here the jury by its verdicts found that false statements by Schott had been

published placing Anderson in a false light that would be highly offensive to a reasonable person, and that such statements were made with knowledge of or reckless disregard for the falsity of the matters asserted and the false light in which Anderson would be placed. Schott asks us to overturn the jury verdicts because the trial court refused to instruct the jury on the affirmative defenses of consent and waiver.

Parties to a lawsuit have a right to have their legal theories submitted to the jury as long as they are supported by the pleadings and substantial evidence. Lockard v. Carson, 287 N.W.2d 871, 875 (Iowa 1980). Even when the evidence is not in dispute, it is viewed in the light most favorable to the party requesting the instruction, and if reasonable minds might draw different inferences from the evidence a jury question is engendered. See Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 744 (Iowa 1977). Schott pleaded both affirmative defenses. We must therefore determine whether substan-

tial evidence existed to engender a jury question on the defenses.

A. Waiver. Schott, in objecting to the trial court's failure to instruct the jury on the affirmative defense of waiver, called the court's attention to evidence that prior to her termination Anderson told a newspaper reporter that her job was in jeopardy. Schott also relied on evidence that Anderson had made a public statement at a city council meeting concerning a drainage problem that her in-laws had with the City, and that she made public utterances after February 17, 1976, concerning her termination. In overruling Schott's subsequent motion for a new trial the trial court stated that the record disclosed no waiver of a right to privacy.

There is evidence that Anderson had stated her job was in jeopardy, and that the newspapers had on several occasions mentioned she was a secretary for LHA. There is also substantial evidence that Anderson injected herself into public controversy and had become newsworthy. To determine whether these incidents consti-

tute substantial evidence that Anderson waived her "false light" invasion of privacy claim, it is necessary to examine the waiver of privacy defense.

The right of privacy may be lost by express or implied waiver by the complaining party. See 62 Am.Jur.2d Privacy § 18, at 703 (1972). Waiver is generally defined as the voluntary and intentional relinquishment of a known right. Williams v. Stroh Plumbing & Electric, Inc., 250 Iowa 599, 602, 94 N.W.2d 750, 753 (1959). For implied waiver to exist, the intention of the party alleged to have waived his or her rights must be clear from the party's conduct. Id. at 602, 94 N.W.2d at 753. Normally the question of waiver is one for the jury; however, where the evidence is not in dispute, the question becomes one of law for the court. Id. at 602-03, 94 N.W.2d at 753.

The evidence upon which Schott relies to establish waiver falls into two basic categories: (1) public utterances-Anderson's statement to the media that her job was in jeopardy, statements in behalf of

her in-laws at a council meeting, and information disclosed to the media concerning her termination; and (2) voluntary newsworthiness--her name appearing in print by virtue of her employment and the fact that she injected herself into a public controversy. We will examine these classifications individually to determine whether either or both present substantial evidence that Anderson waived her right of privacy.

As already noted, to establish her "false light" invasion of privacy claim Anderson was required to prove that Schott caused untruthful statements to be published which placed her in a false light that would be highly offensive to a reasonable person. The statement that Anderson had been terminated was obviously truthful. Therefore, the jury had to have found one or more of the representations concerning the reasons for her discharge untruthful.

Anderson's public utterances do not constitute either express or implied waiver. The fact that an employee discloses

to the press that her job is in jeopardy and makes statements supporting relatives on an issue involving her employer may constitute waiver of the employer's disclosure of truthful private matters in response to those statements, but it does not evidence a voluntary, knowing, and intelligent submission to the employer's subsequent disclosure of false information. Similarly, an employee's statements to the media in response to a previous disclosure by her employer are not probative evidence of waiver. An after-the-fact refutation is a normal reaction when charges are levied against an individual. An effort to clear one's good name cannot, without more, be considered to constitute waiver.

Schott also contends Anderson waived her right of privacy by injecting herself into public controversy and becoming newsworthy. The defense of waiver is closely associated, and many times used interchangeably, with other defenses, such as consent, estoppel by becoming a public figure, being involved in a matter of

public interest, doing an act which is a matter of public record, or merely being in a public place. See Annot., 57 A.L.R. 3d 16, 33 (1974). See also Howard v. Des Moines Register and Tribune Co., 283 N.W. 2d at 298 (no liability in invasion of privacy action for disclosures of matters of public record which are of legitimate public concern); Winegard v. Larsen, 260 N.W.2d at 821; Bremmer v. Journal-Tribune Publishing Co., 247 Iowa at 828, 76 N.W. 2d at 768 (picture of kidnapped child's dead body is newsworthy and privileged from invasion of privacy suit).

Schott, in essence, is asking us to designate his defense of waiver as a defense of newsworthiness and recognize a privilege for newsworthiness in invasion of privacy suits. In Time, Inc. v. Hill, 385 U.S. at 387-91, 87 S.Ct. at 542-44, 17 L.Ed.2d at 466-69, first amendment protections were applied to matters of public interest in an invasion of privacy suit. Schott maintains that just because he disclosed to the public facts concerning Anderson's termination, which the jury

found to be untrue and placed Anderson in a false light, he still was entitled to present his defense of waiver of right of privacy as Anderson voluntarily made a public issue out of her termination. We believe defendant Schott has missed the point. While it is true that Anderson's termination became a newsworthy event, the trial court recognized this and applied the New York Times and Hill requirement of proving actual malice.

The privilege of publishing matters of public interest and items concerning public figures does not extend to false statements; nor does it justify misleading publicity or misrepresentations. Bell v. Birmingham Broadcasting Co., 266 Ala. 266, 269, 96 So.2d 263, 266 (1957). Such falsity cannot be insulated from liability by the defense of waiver without some evidence of conduct clearly indicating that the plaintiff voluntarily and intentionally acquiesced in the falsity. The trial court was correct in determining that there was no such evidence, and it did not err by refusing to instruct on the affirmative

defense of waiver.

B. Consent. Schott also claims the trial court erred in refusing to instruct the jury on his affirmative defense of consent. In support of this contention Schott relies on evidence that following the February 18 airing of the news story on her termination Anderson went to a radio station and taped an interview and went to a newspaper and was photographed and interviewed. Schott also relies on a newsman's testimony that it was possible that Anderson showed him the termination letter she received. In addition, Schott calls our attention to the fact that Anderson's name appeared in the newspaper five or six times in the four-month period prior to her termination. Whether these facts constitute substantial evidence of consent requiring submission of the issue to the jury requires an examination of consent as a defense to invasion of privacy and the circumstances under which the defense is applicable.

"[C]onsent to any publication, either of matter that is personally defamatory

or of matter that invades privacy, creates an absolute privilege so long as the publication does not exceed the scope of the consent." Restatement (Second) of Torts § 652F, comment b (1977). Consent may be obtained by words or conduct intended to demonstrate consent. Id § 892, comments b-c; Id. § 583, comment c. To be effective as a defense the defendant must have consented to the particular conduct at issue or to substantially similar conduct. Id. § 892A 2(b). The extent and content of the alleged consent must therefore be established with particularity. Once consent is established, it is a defense only if the scope of the consent has not been exceeded. 62 Am. Jur.2d Privacy § 19 (1972).

On the basis of both the prior publicity Anderson had received and her subsequent action of seeking media publicity to answer his charges, Schott asserts that Anderson consented to his statements concerning her termination. We fail to see where either of these events constitute words or conduct intended to demonstrate consent to false statements concerning her

termination.

The fact that Anderson's name appeared in the newspaper prior to the claimed invasion indicates at most a willingness on her part to be involved in a newsworthy controversy. Indeed, on most of the occasions when Anderson's name appeared in the newspaper she was merely mentioned as a secretary for LHA. But in any event, agreement by conduct to have one's name publicized by the news media does not evince agreement to have false statements published about one's termination of employment.

The trial court carefully limited the invasion of privacy claim to February 17, 1976. Anderson's subsequent action of going to the media and responding to the reasons for her termination are actions in mitigation of damages rather than proof of consent to the prior publication of false statements about her termination.

We conclude that there was no substantial evidence of consent to an invasion of Anderson's privacy, and that the trial court's refusal to submit an instruction

to the jury on the affirmative defense was correct.

V. Admissibility of exhibit. Anderson testified that the mayor had instructed her to type an affidavit that was signed by the former urban renewal director and the assistant urban renewal director. This affidavit indicated that certain construction plans were not submitted, reviewed, or approved. Anderson offered the exhibit into evidence for the limited purpose of showing that she performed work for the mayor, which the mayor did not remember.

Schott's attorney objected to the admission of the exhibit.

> No proper foundation, Your Honor, it is hearsay. Mrs. Anderson is not the signatoree. It has no relevancy. The jury is going to get completely the wrong impression... It hasn't got Mrs. Anderson's initials on it. Mrs. Anderson just testified herself that she typed it. I believe the introduction of the document will serve no other

purpose. That will completely mislead the jury on what it is.

The trial court admitted the exhibit into evidence and gave the jury a limiting instruction:

> Ladies and Gentlemen of the Jury, the proffered exhibit is going to be allowed for the limited and sole purpose of evidence as to whether or not Mrs. Anderson did the typing for and at the request of Mayor Schauland, and you are admonished that the contents of the exhibit are of no evidentiary value as to any of the issues in this case and are not to be so considered by you.

Schott's initial objection was that there was no proper foundation for the document because Anderson had not signed it. An exhibit must be authenticated to be admissible. See In re Herron, 212 N.W. 2d 474, 476 (Iowa 1973). We believe that there was sufficient authentication through Anderson's testimony, in which she identified the exhibit and testified that she had typed it. The rules governing the admission of written memoranda are procedural, and the trial court has considerable discretion in determining admissibility. Nadler v. Treptow, 166 N.W.2d 103, 105

(Iowa 1969). We find no abuse of that discretion.

Schott also objected to the exhibit on the basis that it was hearsay. The exhibit was offered for a limited purpose, however, and the jury was admonished that the contents of the exhibit were of no evidentiary value as to the issues in the case and were not to be considered as such. Hearsay is defined:

> "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." McCormick on Evidence, § 246 at 584 (2d ed. E. Cleary 1972).

This evidence clearly was not offered to prove the truth of the contents of the exhibit and is not hearsay.

Finally, Schott raised the objection of relevancy. The basic test of relevancy is the question whether the challenged evidence makes the desired inference more probable than it would be without the evidence. Kalianov v. Darland, 252 N.W.2d

732, 735 (Iowa 1977). The evidence must be probative and tend to establish a material proposition. State v. Wilson, 173 N.W.2d 563, 565 (Iowa 1970). Here the evidence had probative value to show that Anderson typed for the mayor. A trial court has discretion to exclude evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. Carson v. Mulnix, 263 N.W.2d 701, 706 (Iowa 1978). Schott claims the city was put in an unfavorable light by the contents of the affidavit. However, he ignores the fact that the city was dismissed from the suit, and he also ignores the admonition by the court that the contents of the exhibit were not to be considered by the jury.

We thus hold that the admission of the exhibit was not error.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Opposition

SUPREME COURT, U.S.
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No. 81-714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHYLLIS M. ANDERSON,
Petitioner,

vs.

THE LOW RENT HOUSING COMMISSION OF MUSCATINE, IOWA and GEORGE SIX,
Respondents.

On Writ of Certiorari to the Iowa Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. There Is No Conflict Between The Iowa Decision And Decisions Elsewhere Warranting The Granting Of The Petition For The Writ Of Certiorari.

The Iowa Supreme Court, in *Anderson* v. *Low Rent Housing Commission of Muscatine,* 304 N.W.2d 239 (Iowa 1981) followed its earlier case of *Blessum* v. *Howard County Board of Supervisors,* 295 N.W.2d 836, 843 (Iowa 1980) in requiring a public figure or public official to prove actual malice by clear and convincing evidence in a defamation suit against a nonmedia defendant. As the first of two reasons in support of

her petition, Mrs. Anderson has found a conflict between the Iowa cases and the cases of *Norris* v. *King* 355 So.2d 21 (La.Ct.App. 1978), Cert. denied, 439 U.S. 995, 58 L.Ed.2d 669, 99 S.Ct. 596 (1978), reh. denied, 439 U.S. 1122, 59 L.Ed.2d 83, 99 S.Ct. 1035 (1979) and *Logan* v. *District of Columbia,* 447 F.Supp. 1328 (D.D.C. 1978). A careful examination reveals that there is no true conflict and that this asserted reason is not sufficiently compelling to warrant the granting of certiorari.

The Court in *Norris, supra,* did not require proof under the standards of *New York Times* v. *Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964), but the *Norris* holding is based at least as much upon plaintiff's status as a private person as upon defendant's status. Impressed by a "publication by one individual involving information concerning another individual," 355 So.2d at 24, wholly without public interest, the standard held applicable was different than the standard appropriate in a case involving a "publication by either the news media, or by some other organization acting in the public interest," 355 So.2d at 24. There was no public interest involved in the defendant's actions "as would bring him within the rights of free speech and press," 355 So.2d at 25. The case at bar involves not only a matter of public interest, that being the smooth operation of local government, but also a public figure, 304 N.W.2d at 247.

Logan, supra, was decided by the District Court for the District of Columbia. Sup.Ct.R. 17(b) refers to conflicting decisions of a state court of last resort and of a federal court of appeals as constituting a reason perhaps important enough to grant the petition. The kind of conflict contemplated by this rule does not exist is the present case.

Rather than conflicting with decisions elsewhere, the Iowa Court is in agreement with courts of last resort in five other states, Minnesota, South Dakota, Connecticut, Maine, and Maryland. The Minnesota Supreme Court in several recent

cases required the plaintiffs to prove actual malice by clear and convincing evidence in their defamation suits against nonmedia defendants. In *Hiram* v. *Rogers,* 257 N.W.2d 563 (Minn. 1977), plaintiff was a public official and the defendant was a county sheriff. In *Fitzgerald* v. *Minnesota Chiropractic Association, Inc.,* 294 N.W.2d 269 (Minn. 1980), because plaintiff was a public figure the defendant was held to be entitled to constitutional protection for defamatory publications in the absence of clear and convincing proof of actual malice. 294 N.W.2d at 270. The statements complained of were contained in an article in one of defendant's newsletters.

Clear and convincing proof of actual malice was required of the police officer plaintiff in his suit against a candidate for the city council based upon statements contained in a campaign leaflet. *Wollman* v. *Graff,* 287 N.W.2d 104 (S.D. 1980).

The issue was discussed extensively in *Dacy* v. *Connecticut Bar Association,* 170 Conn. 520, 368 A.2d 125 (Sup.Ct. 1976). Dacy, publisher of *How to Avoid Probate,* sued the state bar for comments about his book contained in pamphlets. The Court mentioned that the usual burden of proof in civil cases was "more probable than otherwise," but went on to discuss those extraordinary cases where a higher standard is required, among them those where a public official or public figure seeks damages for injury to reputation. It was held that the trial court erred in refusing to charge the jury that actual malice must be proven with convincing clarity, 368 A.2d at 134, since plaintiff was a public figure.

The Supreme Judicial Court in Maine has agreed. In a public official's case against a town and its chairman arising from letters sent to the governor, it was held that convincing clarity of actual malice was the proper standard. Citing *Garrison* v. *Louisiana,* 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964), the Court stated:

> The protections afforded by the New York Times rule to discussions of a public official's conduct are not limited to the media.

Michaud v. *Inhabitants of Town of Livermore Falls,* 381 A.2d 1110, 1113 (Maine 1978).

Although noting that most of the New York Times cases involved media defendants, clear and convincing proof of actual malice was required in *Berkey* v. *Delia,* 287 Md. 302, 413 A.2d 170 (Ct.App. 1980). Plaintiff was a policeman who had stopped defendant for speeding. The defendant thereafter made allegedly defamatory statements in a letter to the police chief and during an investigation of his complaint.

In other states, intermediate courts have imposed the New York Times standard of actual malice by clear and convincing evidence in cases filed by public officials or figures against nonmedia defendants. *Williams* v. *Trust Company of Georgia,* 140 Ga.App. 49, 230 S.E.2d 45 (1976), involved a public official's suit against a college graduation speaker. The Court held that defamed public officials and public figures can recover only upon a showing of actual malice, i.e., "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity, or with reckless disregard for the truth," 230 S.E.2d at 48, and that "the constitutional standard demands that the proof of actual malice be made with convincing clarity," citing *New York Times* v. *Sullivan, supra,* 230 S.E.2d at 51.[1]

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[1] Similar results and language are found in *Sparks* v. *Boone,* 560 S.W.2d 236, 238 (Ky.Ct.App. 1977); *Silbowitz* v. *Lepper,* 55 Misc.2d 443, 285 N.Y.S.2d 456, 459 (Sup.Ct. 1967), aff'd. per curiam, 32 App. Div.2d 520, 299 N.Y.S.2d 564 (1969); and *Exner* v. *American Medical Association,* 12 Wash.App. 215, 529 P.2d 863, 870 (1974).

Decided prior to *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 299 (1974) and its restriction of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 29 L.Ed.2d 296, 91 S.Ct. 1811 (1971), the California case of *Field Research Corp* v. *Patrick*, 30 Cal.App.3d 607, 106 Cal.Rptr. 473 (1973), cert. denied, 414 U.S. 922, 38 L.Ed.2d 157, 94 S.Ct. 218 (1973), applied the New York Times standard. The trial court had instructed the jury that actual malice against the nonmedia defendant must be proved by a preponderance of the evidence. The Court of Appeals found this instruction to be erroneous, holding *Rosenbloom* to be a "constitutional command that actual malice must be proved by clear and convincing evidence." 106 Cal.Rptr. at 476.

Without discussing the degree of proof needed, other state courts have required public officials or figures to prove actual malice against nonmedia defendants.[2]

Two Federal Courts of Appeals have required clear and convincing proof of actual malice. In *Meines* v. *Moriarity*, 563 F.2d 343 (7th Cir. 1977), an arrestee sued drug agents for deprivation of constitutional rights and the agents counterclaimed for defamation. The jury was instructed that the counterclaimants were public officials and, as such, must prove actual malice by clear and convincing evidence. Actual malice was defined as "ill will." The Seventh Circuit approved the instruction except as to the definition of malice. In *Guam Federation Of Teachers, Local 1581, AFT* v. *Ysrael*, 492 F.2d 438 (9th Cir. 1974), cert. denied 419 U.S. 872, 42 L.Ed.2d 111, 95 S.Ct. 132 (1974), a

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[2] See *Jackson* v. *Filliben*, 281 A.2d 604 (Del.Super.Ct. 1971); *Grad* v. *Copeland*, 280 So.2d 461 (Fla.Ct.App. 1973) cert. denied 287 So.2d 682 (Fla.Sup.Ct. 1973); *Fopay* v. *Noveroske*, 31 Ill.App. 182, 334 N.E.2d 79 (Ill.Ct.App. 1975); *Bienvenue* v. *Angele*, 254 La. 182, 223 So.2d 140 (Sup.Ct. 1969); *Bowden* v. *Amick*, 446 S.W.2d 849 (Mo.Ct.App. 1969); *Scott* v. *McCain*, 250 S.E.2d 118 (S.C.Sup.Ct. 1978).

school board member was sued by the union and union officials and members. The trial court entered a directed verdict for the defense, finding that plaintiffs failed to prove actual malice by clear and convincing proof. Although reversing because the court below judged the credibility of witnesses rather than viewing the evidence in the light most favorable to plaintiffs, the standard of proof was approved by the Ninth Circuit.

Without comment upon the trial court's use of the New York Times standard and clear and convincing proof as plaintiffs' burden, the Second Circuit affirmed in *Meeropol* v. *Nizer,* 560 F.2d 1061 (2d Cir. 1977), cert. denied 434 U.S. 1013, 54 L.Ed.2d 756, 98 S.Ct. 727 (1978).

In light of these holdings in sixteen state courts and three federal appellate courts, Iowa would appear to be in the mainstream. The cases relied upon by Mrs. Anderson are factually distinguishable (*Norris, supra*), and from inferior courts, (*Logan, supra*), and as such do not present a conflict with the Iowa ruling so as to require the granting of the petition.

II. The Questions Presented In The Case At Bar Do Not Require Resolution By This Court.

The second reason for granting the petition for writ of certiorari urged by Mrs. Anderson is that there exists an important question of federal law that should be resolved by this Court to provide guidance to courts and litigants throughout the country. Of the two questions she has presented for review, (Petition for Writ of Certiorari, page i), neither warrants action by this Court.

In finding Mrs. Anderson to be a public figure, *Anderson* v. *The Low Rent Housing Commission of Muscatine,* 304 N.W.2d at 247, the Iowa Court applied settled case law. No further review of this issue is warranted.

In requiring proof of actual malice by clear and convincing evidence, the state court did not enter into a confused area of the law nor decide the question in a manner other than would this Court.

In spite of the footnote comment in *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133, 61 L.Ed.2d 411, 430, 99 S.Ct. 2675 (1979), this Court has applied the New York Times rule to numerous case involving nonmedia defendants. Indeed, in *New York Times* itself, no distinction was drawn between the media and the several nonmedia defedants and the rules stated therein do not appear to have been limited to the media. See, for example, the Court's statement of the question presented, 376 U.S. at 268, 61 L.Ed.2d at 699:

> The question before us is whether this rule of liability [the rule applied by the state courts], as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech *and* of the press that is guaranteed by the First and Fourteenth Amendments. (brackets and emphasis added)

and the holdings at 376 U.S. 264, 61 L.Ed.2d 697:

> We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.

and at 376 U.S. 283, 61 L.Ed.2d 708:

> We hold today that the Constitution delimits a state's power to award damages for libel actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable.

In *Garrison* v. *Louisiana,* 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964), the parish district attorney's statements criticizing the official conduct of judges were found to be entitled to protection under the New York Times rule, 379 U.S. at 76, 13 L.Ed.2d at 133. The New York Times standard of actual malice was used in the per curiam opinion as the proper rule when the trial court's jury instructions (defining actual malice as willful or wanton disregard or culpable recklessness and allowing the jury to infer malice) were rejected in *Henry* v. *Collins,* 380 U.S. 356, 357, 13 L.Ed.2d 893, 85 S.Ct. 992 (1965). Plaintiffs there were a county attorney and a city police chief. Defendant was an individual who had been arrested and thereafter stated his arrest was the result of a conspiracy involving the plaintiffs. And in *St. Amant* v. *Thompson,* 390 U.S. 727, 20 L.Ed.2d 262, 88 S.Ct. 323 (1968), the New York Times rule was used in a deputy sheriff's suit against a candidate who, in a televised speech, had charged the plaintiff with criminal conduct.

In light of these cases and of the numerous state and federal courts that have spoken, there can be little doubt as to the scope of the New York Times standard and it would not seem that articulation of the rule by this Court would provide additional guidance.

Furthermore, although the Supreme Court's interpretation of the Constitution is controlling, the primary concern should be whether federal rights thereunder are abridged by state action. Rather than diminishing or infringing upon the free expression rights of the First Amendment, Iowa has extended them, protecting more speech than has to date been *expressly* protected by this Court. In a number of defamation cases (which do, to some extent, involve state statutory or consitutional provisions), the courts have approved the concept of more protective state standards. In *Mashburn* v. *Collins,* 355 So.2d 879, 891-2 (La.Sup.Ct. 1977) the following discussion is found:

> Since the Supreme Court decisions from New York Times through Gertz and Firestone established only minimum safeguards for the freedom of speech and the freedom of press under the First Amendment, it is permissible and perhaps appropriate for a state to grant broader protection of these important rights under its own constitution or laws . . . . A state is free to adopt any reasonable standard, so long as it affords the minimum protection required by the New York Times - Gertz cases.

In the context of its discussion of the state's interest in providing a remedy for a defamed private individual, this Court has stated:

> So long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323, 347, 41 L.Ed.2d 789, 809, 94 S.Ct. 2997 (1974). See also *Davis* v. *Board of Medical Examiners*, 497 F.Supp. 525, 528 (D.N.J. 1980).

Thus, because states may grant greater protection and Iowa has done so, in agreement with the majority of the courts that have spoken, there is no unsettled question mandating resolution by this court. Mrs. Anderson's petition for writ of certiorari should be denied.

Respectfully submitted,

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